DATE FILED: June 7, 2019 5:33 PM
FILING ID: B1BFD929DCCDC
CASE NUMBER: 2019CV31577

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202	
Plaintiff: Defend Colorado, a Colorado nonprofit association v. **Defendants:** GOVERNOR JARED POLIS and THE COLORADO AIR QUALITY CONTROL COMMISSION.	**▲ COURT USE ONLY ▲**
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DEFEND COLORADO'S COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Defend Colorado, by and through undersigned counsel, respectfully submits this Combined Response in Opposition to the Defendants Colorado Air Quality Control Commission's and Governor Jared Polis' Motions to Dismiss ("Motion(s)") and requests that the Court deny the Motions in their entirety.

I. INTRODUCTION

Defend Colorado's Complaint seeks (1) judicial review of two final agency actions under the Colorado Administrative Procedure Act ("APA") and the Colorado Air Pollution Prevention and Control Act ("Colorado Air Act") of the Colorado Air Quality Control Commission's ("Commission") twice refusal to rule on Defend Colorado's Petition for Expedited Public Hearing and Request for Declaratory Order ("Petition"); (2) seeks judicial review under C.R.C.P. 57 and 106(a)(4) of Governor Polis' separate but significantly related March 26, 2019 letter ("Withdrawal Letter") that purports to withdraw Colorado's prior June 4, 2018 attainment date extension request to the U.S. Environmental Protection Agency ("EPA"); and (3) seeks judicial review under C.R.C.P. 57 and 106(a)(4) of the Commission's and Governor Polis' several recent and ongoing violations of the Colorado Air Act and the Colorado Constitution that occurred and are occurring outside the context of Defend Colorado's APA review action. Defend Colorado has brought all three judicial review claims in this singular action for purposes of judicial efficiency due to the significant and related issues of fact and statutory considerations involved.

Defendants wrongly claim that Defend Colorado lacks standing to bring both the APA and non-APA claims contained in its First, Second, and Third Claims for Relief under C.R.C.P. 12(b)(1), and that Defend Colorado has failed to plead any plausible claims for relief under C.R.C.P. 12(b)(5). Defend Colorado has standing under the express language of the APA and well-established Colorado precedent providing for very broad definitions of standing. Defendants conflate their unlawful administrative decision that Defend Colorado did not have standing to file its Petition with the standards governing Defend Colorado's standing in this Court. Defendants ask this Court to simply defer to their unlawful administrative standing

determination, which is one of the central legal issues at stake in this litigation, which would render their decision is unreviewable. The Commission's actions on the Petition at the administrative level that merit judicial review are:

1. On February 14, 2019, Defend Colorado submitted its Petition to the Commission.
2. On February 21, 2019, the Commission agreed to hear the Petition at its next March 21, 2019 Meeting.
3. Between February 21, 2019 and March 21, 2019, substantial briefing on the merits of the Petition was submitted by by several parties to the Commission.
4. On March 21, 2019, the Commission, after only allowing five (5) minutes of presentation each from Defend Colorado and other parties, went into private executive session to deliberate outside the view of the parties and public. After those private deliberations, the Commission announced, without further party participation, that it had concluded in its private session that Defend Colorado lacked standing, and unanimously voted to refuse to rule on the Petition. That same day, the Commission issued a one-page order that did not explain or justify its standing decision, simply stating it in two conclusory sentences.
5. On March 27, 2019 Defend Colorado submitted an Emergency Motion for Reconsideration.
6. Between March 27, 2019 and April 5, 2019, substantial briefing on the merits of the Emergency Motion was submitted to the Commission.
7. On April 5, 2019, the Commission held a telephonic meeting. At the start of the meeting the Commission immediately went into private executive session, with deliberations again outside the public view. No input from the parties was allowed. Upon returning from the private executive session, the Commission again stated, in a conclusory fashion and without further explanation, that Defend Colorado did not have standing, refused to rule on the Petition, and denied the Emergency Motion.

Separately, the Governor's actions leading up to his issuance of the Withdrawal Letter that merit judicial review are:

1. On June 4, 2018, Colorado Department of Public Health and Environment ("CDPHE"), Air Pollution Control Division ("Division"), submitted Colorado's Attainment Date Extension Request to EPA (Exhibit 7A to Defend Colorado's Petition), which included a technical support document (Exhibit 7B to Defend Colorado's Petition) that noted the Division had given the Commission (and the public) notice and the opportunity to comment on the Division's exceptional events demonstration before it was submitted (as required by EPA regulations).
2. On November 14, 2018, EPA published a proposed rule to grant Colorado's attainment date extension request (Exhibit 8 to Defend Colorado's Petition).

3. On December 14, 2018, CDPHE and the Regional Air Quality Council ("RAQC") submitted comments in support of EPA's proposed rule granting Colorado's attainment date extension request.
4. On December 14, 2018, Defend Colorado submitted comments in support of EPA's proposed rule granting Colorado's attainment date extension request (Exhibit 10 to Defend Colorado's Petition).
5. On March 26, 2019, Governor Polis unilaterally issued the Withdraw Letter, without the Commission's, CDPHE's, or the Division's sign on or approval, withdrawing Colorado's June 4, 2018 attainment date extension request.

Defend Colorado has adequately stated its claims under Colorado law. Defendants' Motions ignore Colorado precedent which establishes that pleading standards are inappropriate for APA review actions and provides for liberal pleading standards that greatly disfavors motions to dismiss for non-APA claims. Further, Plaintiffs wrongly invite this Court to decide the merits of this judicial review action without the benefit of the administrative record developed in front of the Commission.[1] Therefore, Defendants' Motions are plainly improper at the motion to

[1] In fact, the very administrative record that the Defendants seek to bar this Court from reviewing contains not only the substantive briefing Defend Colorado submitted in the administrative record (via a Petition, Reply in Support of the Petition, testimony at the (brief) hearing on the Petition, technical presentation prepared for the hearing and entered into the record, Emergency Motion for Reconsideration or Clarification, and Reply in Support of that Emergency Motion), but also substantial documentation of the State's own studies and statements acknowledging the effects of international emissions and exceptional events on ozone concentrations in Colorado as listed in the timeline above and in additional supporting documentation in the administrative record such as: an attainment date extension request submitted by the Division that acknowledged that international emissions are affecting ozone levels in Colorado; comments in support of that extension submitted by CDPHE and the RAQC, a state funded agency that advises the Commission, which confirm that international emissions and exceptional events are significantly contributing to ozone levels in Colorado; a modeling presentation at a RAQC meeting that showed the impact of international emissions to be at a significant 3-8 ppm range, otherwise putting Colorado in compliance with the 2008 ozone NAAQS; and the Division's own statements in its opposition to the Petition that despite international emissions being an issue in Colorado that the Commission was previously looking into on behalf of the Commission, the Governor had directed the Division to forego those efforts, ignore international emissions, and instead prepare for a Serious Nonattainment Area designation.

dismiss stage, and cannot be squared with the broad access to judicial review provided by the APA, the Colorado Air Act, and the Colorado Rules of Civil Procedure.

This case is primarily a challenge to the Commission's two final agency actions based on the extensive administrative record developed before the Commission by Plaintiff Defend Colorado and all the other stakeholders involved, and a challenge to the Governor's related Withdrawal Letter that closely relates to that administrative record. That administrative record contains extensive information that is directly relevant to all of the issues, including the merits, of this case. However, Defendants have refused to certify the administrative record for submission to and review by this Court yet at the same time seek to dismiss Defend Colorado's Complaint based on a selective narrative from the administrative record they refuse to provide. Defendants are instead asking this Court, through their Motions to Dismiss, to make a merits ruling on the substantive issues raised in Defend Colorado's Complaint while trying to withhold the administrative record from judicial review. This important challenge to the Commission's final agency actions can only be determined with the Court first having the full administrative record developed by Defend Colorado, CDPHE, and the Commission in the administrative agency action below. Defendants' merits arguments are wholly improper at this stage, before the full administrative record is certified and this Court has the benefit of reviewing that record after a full briefing on the merits by the parties.

Defendants' C.R.C.P. 12(b)(1) standing arguments come in two forms: first, that Defend Colorado lacked standing to bring its Petition to the Commission at the administrative level and therefore lacks standing to bring its APA claims in its Complaint; and second, that Defend Colorado lacks standing to bring any of its claims (both APA and non-APA) because it lacks

associational standing and has not established injury. Defendants' APA standing arguments do not stand up to the broad definition of "persons" granted standing to bring judicial challenges under the Colorado APA, Colorado Air Act, and the Commission's own procedural rules (all of which define eligible petitioners broadly to clearly include associations such as Defend Colorado). Further, Defendants' argument is circular – because the Commission decided that Defend Colorado lacked standing to bring its Petition at the administrative level, Defend Colorado *ipso facto* lacks standing to challenge the Commission's standing decision in this Court. However, it is exactly that sort of challenge to a final agency action that is authorized by the Colorado APA. This Court is simply not bound by the Commission's own administrative determinations on Defend Colorado's standing. If that were true, it would render the constitutional independence of the Colorado judicial branch irrelevant and make the judicial review provisions of the APA meaningless. Defendants' non-APA standing arguments similarly do not stand up to the broad definition of standing that parties benefit from under clear and established Colorado precedent (which provides easier access to Colorado courts than the federal Article III standing cases that Defendants extensively rely upon). Defend Colorado is a Colorado registered non-profit association whose primary purposes include ensuring that the Colorado Revised Statutes and Colorado Constitution are adhered to by government actors when creating policies, laws, and regulations. Defend Colorado has standing to pursue its non-APA claims under the broad associational standing granted by the Colorado Rules of Civil Procedure and Colorado caselaw.

Finally, Defend Colorado has clearly stated plausible claims for relief under the APA, Colorado Air Act, and C.R.C.P. Rules 57 and 106(a)(4).

This Court should therefore deny both Defendants' Motions to Dismiss in full.

II. STANDARD OF REVIEW

A. Standard of Review under C.R.C.P. 12(b)(1)

Plaintiff Defend Colorado is entitled to a relatively broad definition of standing," because standing "has traditionally been relatively easy to satisfy." *Marks v. Gessler*, 350 P.3d 883, 899 (Colo. App. 2013). Where standing is at issue, a court "may consider any competent evidence pertaining to the motion." *Dicocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006) (citing to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) ("a trial court may consider evidence pursuant to Fed.R.Civ.P. 12(b)(1) without converting the motion to a summary judgment motion as it would be required to do if it considered matters outside the pleadings under a Fed.R.Civ.P. 12(b)(6) motion."). Further, [i]n resolving whether the plaintiff has alleged an injury sufficient to confer standing, a court must accept as true the allegations set forth in the complaint and may weigh other evidence supportive of standing." *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992).

B. Standard of Review Under C.R.C.P. 12(b)(5)

Colorado courts "view with disfavor a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim. *Bly v. Story,* 241 P.3d 529, 533 (Colo. 2010). "Granting [a] motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001). A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011). Under a C.R.C.P. 12(b)(5) motion, Courts

accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Bly,* 241 P.3d at 533. In addition, legal conclusions can provide the complaint's framework if supported by factual allegations. *Aschcroft v. Iqbal,* 556 U.S. 662, 679 (2009). In instances of a complaint with well pled factual allegations, a court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

Further, APA judicial review claims, which are central to this particular matter, present "no need for screening" and a C.R.C.P. 12(b)(5) "plausibility standard has no place in APA review." *Atieh v. Riordan*, 727 F.3d 73, 76 (1st Cir. 2013); *See also Mass. Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 525 (1st Cir. 1993) ("the real question is . . . whether the administrative record, now closed, reflects a sufficient dispute concerning the factual predicate on which [the agency] relied . . . to support a finding that the agency acted arbitrarily or capriciously").

III. THE COLORADO APA CLEARLY AUTHORIZES DEFEND COLORADO TO CHALLENGE THE COMMISSION'S REFUSALS TO RULE ON ITS PETITION

Defend Colorado has standing in this Court under the APA to challenge the Commission's adverse decisions below. Defendants' erroneous rejection of Defend Colorado's standing to file the underlying Petition for Expedited Public Hearing and Request for Declaratory Order has no bearing on Defend Colorado's standing to bring this action in this Court to challenge the Commission's final agency action.[2]

[2] Defendant Governor Polis does not independently assert that Defend Colorado lacks standing to challenge his actions under the Third or Fourth Claims for Relief, and only adopts Defendant Commission's arguments as to Defend Colorado's standing to challenge the *Commission's* refusal to rule on the Petition under the First, Second, and Third Claims for Relief. *See* Gov's. Mot., at 6.

Defendants wrongly conflate the Commission's erroneous conclusions on whether Defend Colorado had legal standing to Petition the Commission with the issue of whether Defend Colorado has APA standing in this Court to challenge the Commission's unlawful refusal to rule on its Petition. The APA plainly reflects the Colorado General Assembly's express intent to "ensure a plain, simple, and prompt judicial remedy" to allow "any person adversely affected or aggrieved by any agency action" to "commence an action for judicial review." C.R.S. § 24-4-106(1), (4).[3] The APA defines a "person" as "an individual, limited liability company, partnership, corporation, *association*, county, and public or private organization of any character other than an agency." C.R.S. § 24-4-102(12) (emphasis added).[4] Defend Colorado is a Colorado nonprofit association whose Mission Statement is:

> To research, study, and engage on government policies, laws, and regulations in the State of Colorado to ensure that those government actions comply with and adhere to the Colorado Revised Statutes and Colorado Constitution and are based on reasonable, justifiable policy decisions that place a priority on facts and science and balance the costs of those policies, laws, and regulations with their intended benefits. To oppose and challenge unlawful, unnecessary, unsubstantiated, and unreasonable government laws, regulations and policies that harm Colorado citizens and businesses. As part of Defend Colorado's social welfare purpose, the organization will take direct actions including petitioning and challenging government actions that are contrary to the goals in this mission statement.

Affidavit of Katherine Kennedy, Director of Defend Colorado, at ¶5, (Exhibit A, attached hereto). Therefore, Defend Colorado, as a non-profit association that advocates for its members

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[3] As a threshold matter, the standing criteria under the APA and Colorado Air Act are the same because petitions for judicial review of final agency actions by the Commission are addressed in accordance with the APA. C.R.S. § 25-7-120(1).

[4] *See also* C C.R.S. § 25-7-103(19) (defining persons as including associations), and the Commission's Procedural Rules, 5 CCR 1001-1.III.K. (defining eligible petitioning parties as including any "entity").

interests, is undisputable a "person" under the Colorado APA and Colorado Air Act. The Commission's Procedural Rules also recognize Defend Colorado as having the right to bring its initial Petition before the Commission. 5 CCR 1001-1.III.K.

Further, "aggrieved," "for purposes of judicial review of agency rulemaking under the APA means having suffered *actual loss or injury or being exposed to potential loss or injury* to legitimate interests including, but not limited to, business, economic, aesthetic, governmental, recreational, or conservational interests." C.R.S. § 24-4-102(3.5) (emphasis added). As noted in its Mission Statement, Defend Colorado advocates on behalf of its organizational purpose for its members' and Colorado citizens' and businesses' statutory rights, including their ability under the Colorado and federal Constitutions to petition their government. Affidavit of Katherine Kennedy, at ¶ 6. One of Defend Colorado's primary functions is to ensure that Colorado's elected officials and administrative agencies – which include Governor Polis and the Commission – adhere to the Colorado Revised Statutes and Colorado Constitution. *Id.* at ¶¶ 5-7. Defend Colorado petitioned the Commission, developed and submitted legal, factual and expert testimony, and participated in two (brief) hearings before the Commission. Defend Colorado's right to petition the Commission was not merely threatened: it was affirmatively denied (based on two non-pubic deliberations) with hardly a cogent explanation by the Commission thereafter. The Commission's conclusion that Defend Colorado lacked legal standing to seek a declaratory order and ensuing refusal to rule on Defend Colorado's Petition is, by itself, a denial of Defend Colorado's right to Petition the Commission as an association under the Colorado Constitution, Colorado APA, and Colorado Air Act, and therefore "aggrieves" Defend Colorado for purposes of standing. *Id.* at ¶¶ 35-40. Further, Defend Colorado and its members are also significantly

injured from the ensuing effects of the Commission's refusal to rule on its Petition – through a likely Serious Nonattainment Area designation by EPA for the Denver Metro / North Front Range Area.[5]

A. Defend Colorado Was a Proper Petitioner at The Administrative Agency Level and Can Independently Pursue APA Review of Both Aspects of the Relief Sought in Its Petition to the Agency

As explained above, the Colorado APA, Air Act, and the Commission's own Procedural Rules all expressly authorize associations such as Defend Colorado to petition the Commission for both public hearings and declaratory orders. Defendants' arguments that Defend Colorado does not have standing all revolve entirely around the erroneous legal conclusions the Commission made in its final agency action refusing to rule on Defend Colorado's Petition that Defend Colorado is now challenging.[6] These are chiefly that (1) the relief Defend Colorado sought was not appropriate for a declaratory order; (2) the portion of Defend Colorado's Petition requesting a declaratory order was the "ultimate relief" sought and not severable from the Petition, therefore precluding Defend Colorado from separately seeking review of its petition for a public hearing on Colorado's annual air quality data certification to EPA.

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[5] Defend Colorado also establishes a litany of injuries (both to Defend Colorado and its substituent members) that result from the Commission's refusal to rule on its Petition in Section IV, *infra,* in response to Defendants' claims that Defend Colorado has not established associational standing outside of APA review, and the Defend Colorado has not established any injury in fact. For the sake of space and avoiding duplicative arguments, Defend Colorado adopts the injuries established in Section IV, *infra*, here, but does not repeat them.

[6] Defendants assert in their Motions this Court is not required to accept as true what they characterize as Defend Colorado's legal conclusions as to the effect of certain provisions of the Colorado Air Act (Comm's. Mot., at 15; Gov's. Mot., at 7), while simultaneously expecting this Court to accept their legal conclusions on their merits arguments as to the effect of those same provisions.

Defendants claims are based on their selective presentation of mere portions of the administrative record (and a selective reading of those portions), while at the same time withholding the full administrative record from this Court. Defend Colorado briefed and testified before the Commission on the legal issues that the Defendants now selective present in their Motions to Dismiss. Defend Colorado briefed and testified on whether the Commission has a statutory duty to hold a public hearing on Colorado's annual air quality data certification to the EPA. Defend Colorado briefed and testified on whether the relief Defend Colorado seeks is appropriate for a declaratory order from this Court. Defend Colorado briefed and testified on whether Defend Colorado's request for a declaratory order from this is wholly separate from its Petition based on the Commission's independent statutory duty to hold a public hearing on Defend Colorado's Petition.[7] Thus the selective arguments Defendants make here are not about this Court's jurisdiction, but their view of the merits of their final agency action.

In this action, Defend Colorado and Defendants disagree over whether Defend Colorado may request a declaratory order (and whether Defend Colorado's petition for a public hearing is severable from its request for a declaratory order) under the Colorado APA and Colorado Air Act. This is exactly the kind of controversy that judicial review under the Colorado APA is designed to resolve – after a court has the benefit of reviewing the underlying administrative record, and the parties' merits briefs, to determine the reasonableness and legality of the

[7] As noted in footnote 1, *supra,* Defend Colorado also spent considerable time in its Reply in Support of the Petition, Emergency Motion for Reconsideration or Clarification, and Reply in Support of the Emergency Motion for Reconsideration or Clarification briefing these exact issues. Defend Colorado does not attach these selected items from the administrative record to this Response because a full review of the entire administrative must occur before this Court decides these critical merits issues.

challenged agency's final action or decision in light of the factual record relevant to that final action or decision. *See* C.R.S. §24-4-106(1) (Judicial review under the APA exists to "assure a plain, simple, and prompt judicial remedy to persons or parties adversely affected or aggrieved by agency actions"). Otherwise, the right to review granted by the Colorado APA would be meaningless.

B. Defend Colorado's Request for a Declaratory Order is Severable from its Request for a Public Hearing, and Defend Colorado is a Proper Petitioner Before this Court

Even if the relief Defend Colorado sought in its request for a declaratory order was improper (which Defend Colorado in no way concedes), Defend Colorado's petition for a public hearing on Colorado's annual air quality data certification to EPA was an entirely separate request for relief, based on a wholly independent statutory duty of the Commission under the Colorado Air Act. The Commission's denial of that separate request for a relief was a final agency action which Defend Colorado may properly bring as an action for judicial review under the Colorado APA. *See Chittenden v. Colorado Bd. Of Social Work Examiners*, 292 P.3d 1138, 1143 (Colo. App. 2012). (For an agency order to be considered a final agency action under C.R.S. § 24-4-106, it must "(1) mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature, and (2) constitute an action by which rights or obligations have been determined or from which legal consequences will flow.")

Defend Colorado's Petition to the Commission, and now Complaint before this Court, both assert that the Commission has an independent statutory duty to hold a public hearing when taking actions affecting Colorado's annual attainment status under the federal Clean Air Act. This includes when the Commission certifies Colorado's annual air quality data to EPA. This

non-discretionary duty exists independent of any request for a declaratory order. Further, this non-discretionary duty provides Defend Colorado, its members, and all Colorado citizens a statutory right – the ability to participate in a public forum before Colorado takes actions affecting its obligations under the federal Clean Air Act. Therefore, regardless of the relief sought by Defend Colorado's request for a declaratory order, the Commission's decision to refuse to rule on the Petition by Defend Colorado has denied Defend Colorado, and its members, their statutory right to participate in the public hearing on Colorado's annual air quality data certification to EPA.

Further, Defend Colorado specifically sought clarification from the Commission at the administrative level that it was denying Defend Colorado's separate petition for a public hearing, which clarification the Commission refused to provide, submitting an Emergency Motion for Reconsideration or Clarification (and a Reply in Support of the Emergency Motion for Reconsideration or Clarification) to the Commission, which the Commission again denied.[8] The Commission's refusal to rule on Defend Colorado's separate petition for a public hearing clearly constitutes a final agency action that marks "the consummation of the agency's decision-making process," determines Defend Colorado's "rights or obligations" and creates "legal consequences" in the form of a denial of a statutory right to participate in a public hearing. *Chittenden*, 292 P.3d at 1143; *CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n*, 610 P.2d 85, 90 (1980)

[8] Defend Colorado's Emergency Motion for Reconsideration or Clarification requested that the Commission address its independent, severable request for a public hearing, or at a minimum, clarify its final order to confirm it was also denying Defend Colorado's petition for a public hearing. The Commission, after an extremely truncated and largely private hearing on Defend Colorado's Emergency Motion for Reconsideration or Clarification, issued an April 8, 2019 order again refusing to address Defend Colorado's separate and independent petition for a public hearing.

("It is evident that under this section, if the Commission's [denial of a petition] is a "final agency action," and if [plaintiffs] are parties 'adversely affected or aggrieved,' they may commence an action in the district court for judicial review within [35] days after the effective date of a regulation").

IV. DEFEND COLORADO HAS STANDING TO BRING THIS JUDICIAL REVIEW ACTION UNDER CLEAR AND ESTABLISHED COLORADO PRECEDENT AND THE COLORADO RULES OF CIVIL PROCEDURE

Defendants' separately assert that Defend Colorado lacks standing to bring its First, Second, and Third Claims for Relief claiming Defend Colorado (1) has not established associational standing (Comm's. Mot. at 14-15); and (2) has not established any injury (Comm's. Mot. at 11-14).

A. Defend Colorado Has Established Associational Standing

While Defend Colorado clearly has standing as a "person" under the APA, Defend Colorado clearly also has "associational" standing to bring its claims challenging the Commission's and Governor's actions under established Colorado jurisprudence. The Colorado Supreme Court has stated, in a case not involving APA standing, that an association has standing when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit." *Colorado Union of Taxpayers Foundation v. City of Aspen*, 418 P.3d 506, 510 (2018).

On the first prong, Defend Colorado's members clearly have standing to sue in their own right. Defend Colorado's members are Colorado businesses and individuals that reside in Colorado, may petition the Commission under the APA, Colorado Air Act, and the

Commission's procedural rules, may challenge the Commission's final agency action under the APA, and separately have the to bring judicial review actions under the Colorado Rules of Civil Procedure. *See* Affidavit of Kevin P. Kauffman on behalf of K.P. Kauffman Company, Inc. ("KPK"), at ¶¶ 4-6 (Exhibit B, attached hereto); Affidavit of Jeffrey Cummings on behalf of Duffy Crane & Hauling, Inc. ("Duffy"), at ¶¶ 4-6 (Exhibit C, attached hereto; Affidavit of Neil Ray on behalf of the Colorado Alliance of Mineral and Royalty Owners ("CAMRO"), at ¶¶ 3-6 (Exhibit D, attached hereto).

On the second prong, as stated in Section III, *supra*, Defend Colorado exists to advocate on issues of importance to its members and Colorado citizens and businesses, including participating in regulatory agency proceedings in Colorado, including petitioning regulatory agencies for rulemakings and then advocating for its members interests in those regulatory proceedings. Affidavit of Katherine Kennedy, at ¶¶ 5-7. Specifically, a primary Defend Colorado purpose is to advocate for Colorado's elected officials and administrative agencies, (such as Governor Polis and the Commission) to adhere to the Colorado Revised Statutes and Colorado Constitution and to participate in specific governmental and agency rulemaking and policymaking activities where those interests are implicated, including the specific matter at issue here. *Id.*

Finally, contrary to Defendants' contention that Defend Colorado must specifically identify members that have been injured (Comm's. Mot., at 14), Defend Colorado's individual members' participation in this suit is not required by the Colorado APA, Colorado Air Act, or

Colorado jurisprudence.[9] Defendants' reliance on *Chamber of Commerce of U.S. v. EPA,* 642 F.3d 192 (2011) and *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) to wrongly assert that Defend Colorado must identify individual members in its complaint to satisfy a standing inquiry is misplaced. Comm's. Mot., at 14. Defendants' claims are based on a mixed-up collage of federal cases dealing with Article III standards (which are not applicable here). Rather, Colorado Courts employ "a relatively broad definition of standing," and are "not bound by federal standing precedent," and "Colorado standing jurisprudence does not duplicate all the features of federal standing doctrine." *Marks,* 350 P.3d at 900 at 899-900. *Colorado Union of Taxpayers Foundation, supra* at 16, instead represents the appropriate jurisdictional inquiry.

Under Colorado law, when an association "seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 55 (1975). Therefore, "participation of [an association's] individual members" is not required. *Colorado Union of Taxpayers Foundation,* 418 P.3d 506, at 511 (citing to *Warth v. Seldin,* 422 U.S. at 515). As Defend Colorado is a proper party under Colorado precedent, and seeks declaratory and injunctive relief which will inure to the benefit of its members if granted, it was not required to name individual members in its complaint.[10] *See* Compl., at ¶¶ 141-182 (Claims for Relief).

B. Defend Colorado Has Sufficiently Established Injury to Legally Cognizable Interests to Satisfy Standing Requirements

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[9] Despite the fact that Defend Colorado's is not required to identify individual members, it has done so in the several affidavits of a variety of its members attached to this Response, both in this section and in section IV.B., *infra.*

[10] Further, had Defend Colorado been afforded the opportunity in the public hearing sought by its Petition, Defend Colorado would have presented on individual harms to its members.

Defend Colorado and its members are "aggrieved" under C.R.S. § 24-4-106 and the two-prong test established by the Colorado Supreme Court in *Wimberly v. Ettenberg*: "whether the plaintiff has suffered injury-in-fact to a legally protected interest *as contemplated by statutory or constitutional provisions.*" 570 P.2d 535, 539 (Colo. 1977) (emphasis added). "The injury in fact element of standing need not consist of a direct, pecuniary loss," and in the "context of administrative action, this element of standing does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action 'threatens to cause' an injury." *Board of County Com'rs, LaPlata County v. Colorado Oil and Gas Conservation Com'n*, 81 P.3d 1119, 1122 (Colo. App. 2003).

To meet this standard, a "plaintiff must demonstrate the existence of a legal right or interest that arguably has been violated by the conduct of the other party." *Id.* at 1123. The legal right or interest "can emanate from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief." *Id.* In short, "[d]eprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact." *Marks*, 350 P.3d at 899 (citing *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004); accord *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1058 (Colo.1980) ("It is . . . well settled that the injury in fact conferring standing may not only be intangible, but may exist solely by virtue of statutes creating legal rights the invasion of which creates standing." (*internal citations and quotations omitted*).[11] Finally, "[i]n the context of administrative action, the injury

[11] Defendants' rely on *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890-91 (Colo. 2001) to assert that harm "[i]ndirect and incidental to the defendant's action is insufficient to establish standing." Comm's. Mot. at 11. *Brotman* dealt with a challenge to a transaction that, once completed, would give a landowner the *hypothetical* ability to condemn a right-of-way

in fact element does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action threatens to cause an injury." *Marks,* 350 P.3d at 900.

Defend Colorado has described actual or threatened injuries-in-fact suffered because of the Commission's denial of its constitutional and statutory rights to petition its government under established First Amendment jurisprudence and to seek to participate in a public hearing before the Commission on the extremely consequential issue of Colorado's annual air quality data certification to the U.S. EPA. At the outset, the Commission's rejection of the Defend Colorado's Petition and refusal to even consider the merits of that Petition was a final agency action that injured Defend Colorado. This denial of Defend Colorado's constitutional and statutory rights to petition a Colorado agency for redress is a concrete and legally cognizable injury that has already occurred: it was not some academic denial of some future claimed right or expectation.

The Commission's refusal to rule on Defend Colorado's Petition is also a violation "of its mandatory statutory duty to hold a hearing under the Colorado Air Act." Compl., at ¶¶ 154, 167. Further, the Governor's improper influence over the Commission's decision-making process and the Commission's acquiescence to the influence represents a violation of the

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across an adjacent landowner. *Id.* at 891. However, the reviewing court noted that the condemnation may never accrue. *Id.* Further, the court noted that even if the condemnation were to happen, the underlying action was the result of a valid, constitutional exercise of rights. *Id.* Defend Colorado's situation is not analogous. First, under the APA and *CF&I Steel Corp.*, Defend Colorado can seek judicial review of the Commission's final agency actions. Second, Defendants' have harmed Defend Colorado and its members by violating their statutory and constitutional rights to effectively participate in a public hearing and by violating their statutory duties for accurate and complete annual air quality certifications to EPA under the federal Clean Air Act, likely resulting in direct, tangible economic harm to Defend Colorado and its members through a Serious Nonattainment Area designation for the Denver Front Range Area.

"separation of powers required by Article III of the Colorado Constitution and the Commission's duties under the Colorado Air Act." *Id.* at ¶ 176. Finally, Governor Polis' Withdrawal Letter further violates the separation of power and infringes on Defend Colorado's, and its members, rights by also denying them the ability to participate in the public hearing the Commission would be required to hold under the Colorado Air Act if it had issued the Withdrawal Letter. *Id.* at ¶ 182.[12]

These injuries are described by affidavits of Defend Colorado's director and select members attached to this Response. For example, the Commissions' refusal to rule on Defend Colorado's Petition injures those individual members by initially depriving them of their statutory right to petition the Commission, as well as their right and ability to participate in a public hearing on Colorado's annual air quality data certification to EPA (as well as participating in a hearing on Colorado's air emissions inventory), and violating their right to have governmental actors adhere to the separation of powers required by the Colorado Constitution (including unlawful interference in the petition process itself, contributing to the injury of the petition being rejected without the merits even having been considered). *See* Affidavit of Katherine Kennedy, at ¶¶ 35-39; Affidavit of Kevin P. Kauffman, at ¶¶ 11-12; Affidavit of Jeffrey Cummings, at ¶¶ 12-13; Affidavit of Neil Ray, at ¶¶ 11-12. The Commission's and the Governor's actions have also injured Defend Colorado and its members by violating the separation of power required by the Colorado Constitution, depriving Defend Colorado and its members from being able to participate in the public hearing that would be required to be held if

[12] The Governor has not challenged Defend Colorado's standing to bring its fourth claim for relief, as Defend Colorado's clearly is a valid petitioner to bring a C.R.C.P. 106(a)(4) or C.R.C.P. 57 claim, and has clearly alleged an injury to a legally protected interest.

the Governor's Withdrawal Letter had been issued by the Commission after the result of a public hearing as required by the Colorado Air Act. *See* Affidavit of Katherine Kennedy, at ¶ 40; Affidavit of Kevin P. Kauffman, at ¶ 13; Affidavit of Jeffrey Cummings, at ¶ 14; Affidavit of Neil Ray, at ¶ 13.

Finally, the Commissions refusal to rule on Defend Colorado's Petition will likely injure Defend Colorado and its members by resulting in the imposition of unnecessary, burdensome, and costly regulatory requirements as a result of a Serious Nonattainment Area designation that itself is the result of the Commission's flawed annual air quality data certification to EPA that is not supported by science and fact as require by Colorado law. The harms that will result to Defend Colorado and its members from a Serious Nonattainment Area designation are several and non-speculative. *See* Affidavit of Katherine Kennedy, at ¶¶ 39-42 (Describing the harms to Defend Colorado's members from lower thresholds for: Title V operating permits, new or modified source permits, and existing major sources; and separately discussing the harms to Defend Colorado from lost member dues due to those same negative effects); Affidavit of Kevin P. Kauffman, at ¶ 14 (Describing the harmful regulatory and oversight permitting requirements on KPK's operations as an oil and gas operator); Affidavit of Jeffrey Cummings, at ¶ 15 (Describing the impacts on Duffy's transportation and hauling vehicle and crane fleets, the many regulated entities that Duffy provides services to, and the potential loss of construction contracts for new or modified oil and gas processing plants); Affidavit of Neil Ray, at ¶ 14 (Describing the reduced lease and royalty payments for CAMRO members, diminished long-term value of mineral rights for CAMRO members, and corresponding reduction in membership dues collected by CAMRO).

Defend Colorado's, and its member's, alleged injuries are the exact sort of right or interest that "can emanate from a constitutional, statutory, or judicially created rule of law" which "entitles [Defend Colorado] to some form of judicial relief." *Board of County Com'rs, LaPlata County*, 81 P.3d at 1122.

C. Defend Colorado Has Suffered Injury-In-Fact to Legally Protected Economic Interests

In addition to statutory and constitutional injuries, Defend Colorado has suffered economic injuries from the Commission's and Governor's actions. Under Colorado Supreme Court precedent, economic injuries can be established as an injury-in-fact when a legislative intent to protect from those same harms is "explicit or fairly inferable from the statutory provisions under which an agency acts or if the legislature expressly confers standing on competitors to seek review of agency action." *Cloverleaf Kennel Club, Inc.*, 620 P.2d at 1057. Similarly, policy decisions, including those involving Colorado's obligations under the federal Clean Air Act, are required to be consistent with the legislative declaration of the Colorado Air Act, which requires that the Commission "achieve the most accurate inventory of air pollution sources," and to "provide for the most accurate enforcement program achievable based upon that inventory." C.R.S. § 25-7-102.[13]

As alleged in the Complaint, the Commission's and the Governor's statutory and constitutional violations will likely result in the Denver Front Range Area being downgraded to a

[13] *See* C.R.S. §25-7-105(1) ("the [C]ommission shall promulgate such rules and regulations as are consistent with the legislative declaration"); C.R.S. §25-7-106(1) ("such [air quality control] program and regulations shall be consistent with the legislative declaration"); *see also* Compl., at 65-66 (Commission must develop the air quality control program, and policy and strategy for the same "consistent with the legislative declaration").

Serious Nonattainment Area. Compl., at ¶¶ 4-5, 92. The Complaint sets forth several economic harms to Defend Colorado and its members that will result from a Serious Nonattainment Area designation, including burdensome increased federal regulatory oversight, and more stringent permitting requirements. Compl., at ¶¶ 22-29. Additionally, as set forth in the affidavits of Defend Colorado members Kevin P. Kauffman, Jeffrey Cummings, and Neil Ray, a Serious Nonattainment Area designation will result in significant economic hardships to their individual businesses. *See* Affidavit of Kevin P. Kauffman, at ¶ 14 (Describing the stringent permitting requirements that will be time-consuming, costly, onerous, and that will impair KPK's operations as an oil and gas operator, decreasing KPK's margins, and in many cases make existing and future operations no longer cost-effective or feasible); Affidavit of Jeffrey Cummings, at ¶ 15 (Describing how it will be difficult for Duffy to maintain, replace, repair, and upgrade its transportation and hauling vehicle and crane fleet; significantly raising diesel costs to run Duffy's vehicle and crane fleet; and significantly decrease Duffy's business opportunities with regulated entities in the Denver Front Range area, including the potential loss of construction contracts for oil and gas processing plants); Affidavit of Neil Ray, at ¶ 14 (Describing the reduced lease and royalty payments for CAMRO members, diminished long-term value of mineral rights for CAMRO members, and corresponding reduction in membership dues collected by CAMRO). Finally, as set forth in the affidavit of Defend Colorado's Director, Katherine Kennedy, Defend Colorado is dependent on member dues to be able to continue to advocate for its Mission Statement, and if Defend Colorado's members are harmed economically, so will Defend Colorado's operating ability. Affidavit of Katherine Kennedy, at ¶ 43.

These are non-speculative economic harms, grounded in legally protected interests, and establish Defend Colorado's standing to bring this action.[14]

V. DEFEND COLORADO HAS ADEQUATELY STATED ITS CLAIMS UNDER C.R.C.P. 12(b)(5)

Defendants assert that Defendant Colorado has failed to state a claim, not by arguing the insufficiency of Defend Colorado's pleadings, but by arguing the merits of Defend Colorado's claims. The Defendants' merits arguments in their Motions that they got "the law" right when refusing to rule on Defend Colorado's Petition amply demonstrate that Defend Colorado has indeed made out a colorable claim, and Defendants are already answering it. The Defendants conflate their belief that they should win on the merits with the entirely different issue of whether Defend Colorado has made legally cognizable claims the merits of which should be argued. Defend Colorado also wishes to get to the merits as soon as possible, but the Defendants have materially jumped the gun. They must first certify and submit the complete administrative record, the parties must brief the merits based on that record, and only then can this Court make a decision regarding the final agency action based on that record.

The Commission has moved to dismiss Defend Colorado's First, Second, and Third Claims for Relief for a failure to state a claim under C.R.C.P. 12(b)(5). The Commission asserts, essentially arguing the merits of the case, that Defend Colorado's claims "are based on a fundamental misunderstanding" and "mischaracterizations" of the Colorado Air Act and federal

[14] Further, Defend Colorado and its members must protect those interests now. If they wait to bring a challenge until the Denver Front Range Area is designated as a Serious Nonattainment Area by EPA, they will have no recourse to sue the Commission or the Governor as their actions will be past the statutory timeframe for bringing APA review actions. Further, Defend Colorado and its members would be unable at that time to challenge EPA, as it is not bound by the Commission's or the Governor's statutory and constitutional duties under Colorado law.

Clean Air Act. Comm's. Mot., at 2. The Commission incorrectly characterizes the factual allegations and mixed allegations of fact and law in the Complaint as "legal conclusion[s], which this Court need not accept as true." Comm's. Mot., at 5, 6, 17, 18, 19, 20. Governor Polis similarly moves to dismiss Defend Colorado's Third and Fourth Claims for Relief for failure to state a claim under C.R.C.P. 12(b)(5), again arguing they contain primarily legal conclusions that this Court need not accept as true. Gov's. Mot, at 13.

A complaint cannot be dismissed for failure to state a claim upon which relief can be granted if it pleads "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007).[15] Requiring "plausible grounds [for a claim] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [of a claim]." *Twombly*, 550 U.S. at 556. The standard remains a liberal one, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) quoting *Twombly*, 550 U.S. at 556.

In cases brought under the APA for judicial review of final agency action, such as the present case, there is no discovery or trial. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973).[16] The

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[15] Colorado courts interpret state rules of civil procedure harmoniously with similarly worded federal rules. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016). Federal jurisprudence under Fed. R. Civ. P. 12(b)(6) is persuasive, since the federal rule is identical to section (b)(5) of this rule. *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005); *Walker v. Van Laningham*, 148 P.3d 391 (Colo. App. 2006).

[16] Where a state APA provision parallels the federal APA, it is appropriate to consider federal precedent and other commentary. *Colo. Mining Ass'n v. Urbina*, 318 P.3d 562, 570 (Colo. App. 2013) *quoting Regular Route Common Carrier's Conference v. Pub. Utils. Comm'n*, 761 P.2d 737, 748 (Colo. 1988)

focal point of judicial review in an APA case shifts from whether the complaint states a plausible claim to whether the administrative record sufficiently supports the agency's decision.

> The plausibility standard is a screening mechanism designed to weed out cases that do not warrant either discovery or trial. *See, e.g., Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 46 (1st Cir. 2012). To this end, the plausibility standard asks whether the complaint "contain[s] sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 570). APA review, however, involves neither discovery nor trial. Thus, APA review presents no need for screening. It follows that the plausibility standard has no place in APA review.

Atieh, 727 F.3d at 76 (1st Cir. 2013). *See also Mass. Dep't of Pub. Welfare*, 984 F.2d at 525 ("the real question is . . . whether the administrative record, now closed, reflects a sufficient dispute concerning the factual predicate on which [the agency] relied"). Therefore, Defend Colorado's APA review claims against the Commission are not subject to a plausibility standard. Defendants seek to avoid this outcome, and judicial review, by attempting to persuade this Court to decide the merits of this APA case while withholding the administrative record that must be the basis for any such decision.

Further, judicial review actions such as those under C.R.S. 24-4-106(7) require that a court set aside agency action that is "a denial of statutory right," "contrary to constitutional right," "in excess of statutory jurisdiction," and "not in accord with the procedural limitations of [the APA] or as otherwise required by law." Similarly, under C.R.C.P. 106(a)(4) a court reviews, in part, whether a governmental office "has exceeded its jurisdiction." C.R.C.P. 57 allows courts to "declare rights, status, and other legal relations." C.R.C.P. 106(a)(4) and C.R.C.P. 57 therefore charge a court with examining questions of statutory or constitutional interpretation in the context of agency action, quasi-judicial action, and legal relations that is

directly analogous to APA review actions, and result in a similar need for a court to review those challenges in light of the full factual predicate in which they are brought.[17]

A. The Complaint Pleads Redressable Claims for Relief

Even if Defend Colorado is required to meet the higher "plausibility" pleading standard under *Warne v. Hall*, 373 P.3d 588 (2016), C.R.C.P. 8(a) only requires Defend Colorado to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Defend Colorado's Complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *accord Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 n.15 (1987) (under Federal Rule 8, claimant has "no duty to set out all of the relevant facts in his complaint"). "Specific facts are not necessary in a Complaint; instead, the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Epos Tech. LTD v. Pegasus Techs. LTD.*, 636 F. Supp. 2d 57, 63 (D.D.C. 2009) (*quoting Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). In order to survive a motion to dismiss under C.R.C.P. 12(b)(5), "the factual allegations of the complaint must be enough to raise a right to relief 'above the speculative level.'" *Warne*, 373 P.3d at 591 (*citing Twombly*, 550 U.S. at 556).

Defend Colorado's Complaint raises significant issues concerning the mixed factual and legal issues surrounding the Commission's rejection and refusal to even consider the merits of Defend Colorado's Petition and the Governor's interference in that process. Separate from the APA review issues in Defend Colorado's Petition, the Complaint also raises significant mixed

[17] C.R.C.P. 57 acknowledges in part (i) that when a declaratory judgement action "involves issues of fact, such issues may be tried and determined in the same manner as issues of facts are tried and determined in other actions."

factual and legal disputes under Defend Colorado's C.R.C.P. 57 and 106(a)(4) judicial review claims against the Commission and Governor Polis that relate to the interplay between the roles of the Commission, CDPHE, the Division, and the Governor under the Colorado Air Act and the Colorado Constitution in administering Colorado's Clean Air Act obligations. *See* Compl., at ¶¶ 59-69; First – Fourth Claims for Relief.

1. The Complaint Alleges Sufficient Facts Supporting the First and Second Claims for Relief

The Complaint in this matter alleges sufficient factual allegations on Defend Colorado's First and Second Claims for Relief to survive a motion to dismiss. For example, the Complaint alleges that the Commission refused to hold (and on current information and belief, never held) a public hearing on its 2019 annual certification of air quality data to EPA. Compl., at ¶¶ 151-154. The Complaint alleges that the Commission's annual air quality data certification to EPA does not (and upon current information and belief, did not when submitted by May 1st, 2019) include a complete, accurate, and scientifically based accounting of international emissions or exceptional events based on the "most accurate inventory of air pollution sources possible." Compl., at ¶¶, at 162-164. The Complaint alleges that the Commission has the means to "flag" international emissions and exceptional events in its annual air quality data certification to EPA, but has failed to do so. Compl., at ¶ 52. The Complaint alleges that international emissions and exceptional events are impacting Colorado's ozone air quality data to such a significant extent that the Commission must include information on international emissions and exceptional events in its annual air quality data certification to EPA in order for that certification to be accurate. Compl., at ¶¶ 94-109. The Complaint alleges that the Commission is well aware, and has for a long time been well aware, of the significance of international emissions and exceptional events,

but is acting in contradiction to its statutory duties by ignoring the significance of those emissions.[18] *Id.*

The Complaint separately alleges that the Commission's and Governor's actions are likely to result in a Serious Nonattainment Area designation for the Denver Front Range Area. Compl., at ¶¶ 22, 79-93. The Complaint further alleges a Serious Nonattainment Area designation for the Denver Front Range Area will result in imposition of stricter permitting requirements, emission control requirements, and monitoring requirements thereby harming Defend Colorado's members. Compl., at ¶¶ 22-28, 146-148.

Defend Colorado's has therefore alleged that the Commission has a statutory duty to hold a public hearing when it takes actions affecting Colorado's air quality control program and clean air act obligations, and has alleged the supporting facts that the Commission's current action, and inactions, will do just that. These facts are more than adequate to raise a right to relief "above the speculative level." *Warne*, 373 P.3d at 591.

2. The Complaint Alleges Sufficient Facts Supporting the Third Claim for Relief

[18] As both Defendants point out, Defend Colorado mistakenly stated in its Complaint that the Commission was the state agency whom submitted Colorado's June 4, 2018 attainment date extension request to EPA, when the CDPHE submitted the extension. This typographical error does not change Defend Colorado's Complaint contained substantial additional factual allegations that the Commission was well-aware of the effects of international emissions and exceptional events prior to its annual air quality data certification to EPA, through the longstanding research and public comment by air agencies in the state of Colorado that explicitly acknowledges the effects of international emissions and exceptional events. Further, this issue is easily cleared up when the full administrative record is certified, which includes the June 4, 2018 attainment date extension request, which request has a supporting technical demonstration document (Exhibit 7B to Defend Colorado's Petition) that specifically notes the Commission was given public notice of the Division's public comment period on its exceptional events demonstration (and which Defend Colorado was the party responsible for introducing into the administrative record, correctly identifying CDPHE as the author at that time).

Both Defendants spend time in their Motions distinguishing the Commission, as a type-1 agency, from CDPHE, as a type-2 agency, in order to assert that there are no facts to support Defend Colorado's Complaint. Comm's. Mot., at 23-24; Gov's. Mot., at 8-11. The Commission's Motion asserts that as an independent type-1 agency, Defend Colorado cannot contend that the Governor issued a directive to the Commission. Def. Comm. Mot, at 24. Defendant Governor Polis' motion asserts that Governor Polis' ability to direct and control CDPHE as a matter of law means that his actions in issuing the Withdrawal Letter were lawful. Gov's. Mot., at 10-11.

These arguments miss the point of Defend Colorado's Complaint, which is to have this Court review and declare that both the Commission's and the Governor's actions violated the statutory duties vested and bestowed solely on the Commission under the Colorado Air Act, and violated the separation of powers required by the Colorado Constitution. In short, the Third Claim for Relief (along with the Fourth Claim for Relief), revolves around the principle that the Commission is the "state agency for all purposes of the federal act and regulations promulgated under said act." C.R.S. § 25-7-124(1). Therefore, the Commission, not CDPHE or the Governor, is the sole state actor that should be submitting Colorado's annual air quality data certifications to EPA, issuing attainment date extension requests,[19] or withdrawing the same.

[19] Defendant Governor Polis asserts in his Motion that Defend Colorado "does not contest" that it was appropriate for the Division to issue the June 4, 2018 attainment date extension request. Gov's. Mot., at 10. This is facially incorrect in light of Defend Colorado's Complaint, which asserts that the Commission is the sole agency for the purpose of Colorado's Clean Air Act obligations. Defend Colorado has not challenged the legality of the Division's June 4, 2018 extension request in its Complaint because such a challenge would now be time barred under the APA. Further, any declaratory or injunctive relief issued by this Court at the conclusion of this action will resolve the propriety of the Division issuing the prior attainment date extension request by declaring "the rights, status and other legal relations" of the parties. C.R.C.P. 57.

Any attempt by Governor Polis to interfere with the Commission's statutory obligations is therefore a violation of the Colorado Air Act and the separation of powers required by the Colorado Constitution. That the Commission in an independent type-1 agency, and that the Governor could lawfully give direction to CDPHE (which Defend Colorado contends is not the agency tasked with submitting attainment date extension requests) is therefore irrelevant. Further, while the Governor may delegate policy actions to the CDPHE, that authority does not vest the Governor with the right to then interfere in how CDPHE goes about effectuating that delegation, and it certainly does not give the Governor the authority to then interfere with the independent statutory duties of the Commission.

To that end, the Complaint alleges that Governor Polis specifically ignored the extensive technical air quality data (much of it developed by the state, RAQC, and CDPHE), and instead directed those entities to forego any efforts to take into account international emissions or exceptional events. Compl., at ¶ 113. The Complaint further alleges that the CDPHE specifically briefed and testified to the Commission that the Governor did not approve of any further research into an international emissions or exceptional events demonstration, and that either way, the Governor asserted it was not the Commission's role to submit Colorado's annual air quality data certification to EPA.[20] Compl., at ¶¶ 116-117. The Complaint also alleges that

[20] Notably, if the administrative record is certified, during the Commissions hearing considering Defend Colorado's Petition, Robyn Wille, then attorney for the Air Pollution Control Division of CDPHE (now representing the Commission in this action), pointedly informed the Commission that the Division "didn't like" telling the Commission what its role was, but that the Division didn't believe the Commission had the authority to effect Colorado's annual air quality data certification to EPA. It is exactly these types of pointed influences that Governor Polis had over the Commission's consideration of Defend Colorado's Petition that this Court must review before reaching a merits ruling on the Complaint.

when considering Defend Colorado's Emergency Motion for Reconsideration or Clarification, the Commission refused to publicly discuss its decision-making process, receiving legal advice in private session under suspicious circumstances. Compl., at ¶¶ 124-127.

Defend Colorado alleged that the Governor may not lawfully interfere in the Commission's exercise of its independent statutory duties, and further alleged that the Governor did just that. Compl., at ¶¶ 128-132; Third Claim for Relief. Such specific allegations are more than adequate to raise a right to relief "above the speculative level." *Warne*, 373 P.3d at 591.

3. The Complaint Alleges Sufficient Facts Supporting the Fourth Claim for Relief

The Complaint alleges the only (undisputable) facts necessary to proceed under the Fourth Claim for Relief – that Governor Polis unilaterally, without a public hearing, and without authorization or the collaboration of the Commission, CDPHE, or Division, issued the Withdrawal Letter to EPA. Compl., at ¶¶ 133-140. These facts, which at this stage must be taken as true, are sufficient to support and make out Defend Colorado's claim that the Governor's action was unlawful under the Colorado Air Act and the separation of powers required by the Colorado Constitution. This plausible claim is appropriate for judicial review under C.R.C.P. 57 and 106(a)(4). Further, because this issue is closely tied to the factual and legal issues raised in the other Claims, this Court will be aided in its decision on this Claim by its review of the administrative record.

B. Proceeding with Certifying the Administrative Record and Judicial Review for all Four Claims for Relief is Necessary

Because Defend Colorado has standing to pursue and has properly pled all four of its Claims for Relief under C.R.C.P. 12(b)(5), it is both appropriate and efficient for this court to

require the administrative record to be promptly certified and to examine that record before resolving the merits of Defend Colorado's Complaint. This will allow the court to fulfill its obligations under the APA in reviewing final agency actions based on the administrative record. Further, as a practical matter, it will benefit from the airing of the factual and legal issues that took place at the administrative level. Further, because all four Claims for Relief share common nuclei of fact and legal interpretation, this will allow the court to efficiently examine all issues in the same context.

The only item extraneous to the administrative record on Defend Colorado's Petition that is introduced by the Complaint is Defendant Governor Jared Polis' Withdrawal Letter, which is publicly available online, was attached to the Complaint, and which this Court can easily take judicial notice of. Further, the Withdrawal Letter is a part of the record of Defend Colorado's C.R.C.P. 57 and 106(a)(4) challenges to Governor Polis' actions. *See* C.R.C.P. 106(a)(4)(I) (Judicial review under a C.R.C.P. 106(a)(4) claim "shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record"). It is therefore proper for this case to proceed to record certification and merits briefing.

VI. DEFEND COLORADO MAY PURSUE ITS NON-APA CLAIMS AGAINST DEFENDANTS UNDER C.R.C.P. 57 AND 106(a)(4)

Defend Colorado may pursue its non-APA review claims against both Defendants under C.R.C.P. 57 and 106(a)(4). Defend Colorado's Complaint is not only seeking review of the Commission's refusal to rule on its Petition under the APA – and the relief sought cannot be fully adjudicated under C.R.S. § 24-4-106. Defend Colorado also seeks relief against the Commission and the Governor for their failure to adhere to the Colorado Air Act, and for their

unlawful violation of the separation of powers required by the Colorado Constitution. *See* Compl., at First – Fourth Claims for Relief.

For example, Defend Colorado's Prayer for Relief requests extensive relief that goes beyond this Court simply declaring the Commission's refusal to rule on Defend Colorado's Petition was unlawful (as would be provided under C.R.S. § 24-4-106). Defend Colorado has requested additional relief including this Court declaring that the Commission has violated its statutory duties to develop an accurate air emissions inventory and requiring the Commission to hold a public hearing to develop that inventory, declaring the Governor and Commission violated the separation of powers required by the Colorado Constitution, and enjoining Governor Polis' Withdrawal Letter. Compl., at p.27 (Prayer for Relief). Therefore, Defend Colorado's claims under C.R.C.P. 57 and 106(a)(4) are necessary and appropriate.

A. Defend Colorado Can Seek Judicial Review of the Commission's Non-APA Actions under C.R.C.P. 57.

In the same breath that Defendant Commission argues that Defend Colorado has no standing and cannot petition the Commission under the APA, it argues that Defend Colorado cannot seek judicial review of the "Commission's decision" on Defend Colorado's Petition under C.R.C.P. 57 because Defend Colorado has an adequate remedy at law under the APA.[21] Comm's. Mot, at 25. However, Defend Colorado's Complaint seeks relief beyond the scope of the Commission's refusal to rule on Defend Colorado's Petition, including additional relief

[21] The Commission does not mention or challenge the application of C.R.C.P. 106(a)(4) in its Motion. Defendant Governor Polis concedes that if the Third and Fourth Claims for Relief are allowed to proceed, C.R.C.P. Rule 57 is appropriate for handling both claims. Gov's. Mot., at 17. To the extent Defend Colorado's requested relief against the Governor can be resolved under C.R.C.P. 57, it agrees with Defendant Governor Polis. *But see,* Section VI.B., *infra.*

requiring the Commission to develop an accurate air emissions inventory, and declaring the respective roles and relationship of the Commission and the Governor under the Colorado Air Act and Colorado Constitution. *See Arapahoe Roofing & Sheet Metal v. Denver*, 831 P.2d 451 (Colo. 1992) (The proper forum for a challenge to the constitutionality of a statute or ordinance under which an administrative agency acts is a district court where a declaratory judgment can be sought).

The nominal availability of judicial review under C.R.S. section 24-4-106(4) or C.R.C.P. 106(a)(4) does not preclude a C.R.C.P. 57 action seeking declaratory relief. *Collopy v. Wildlife Comm'n*, 625 P.2d 994, 1006 (Colo. 1981) (allowing C.R.C.P. 106(a)(4) and 57 actions when petitioner challenged the constitutionality of regulation adopted by Commission). *See also Utah Int'l, Inc. v. Bd. of Land Comm'rs*, 579 P.2d 96 (1978) (It is permissible to join § 24-4-106 action and action under C.R.C.P. 57 for purposes of review). Therefore, Defend Colorado's C.R.C.P. 57 claims against the Commission may properly remain in this action.

B. Defend Colorado's Fourth Claim for Relief Against Governor Polis is Appropriate Under C.R.C.P. 106(a)(4)

C.R.C.P. 106(a)(4) claims are appropriate when a government officer exercises a judicial or quasi-judicial function and has exceeded his or her jurisdiction. The nature of the Governor's Withdrawal Letter arguably involves a quasi-judicial action.

Defendant Governor Polis' Motion states that "the existence of a legislatively mandated notice and hearing requirement is clear proof that an action is quasi-judicial." Gov's. Mot., at 15-16 (citing to *Chellsen v. Pena*, 857 P.2d 472, 475 (Colo. App. 1992). Defend Colorado's Complaint argues that any attainment date extension request, or any subsequent withdrawal of an attainment date extension request, is an action that (1) can solely be performed by the

Commission, and (2) is subject to a public hearing under C.R.S. § 25-7-124, C.R.S. § 25-7-110 before being issued. Compl., at ¶¶ 68-69, Third and Fourth Claims for Relief. The Governor's unilateral issuance of the Withdrawal Letter therefore took place without the hearing required by the Colorado Air Act, and was issued in a quasi-judicial action. Therefore, as the Governor's issuance of the Withdrawal letter "is likely to affect the rights and duties of specific individuals and is reached through the application of preexisting legal standards or policy considerations to present or past facts developed at a hearing . . . [the Governor was likely] acting in a quasi-judicial capacity." Gov's. Mot., at 15-16 (citing to *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622 (Colo. 1988)); *see also Kornfeld v. Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977) (The function of a proceeding under C.R.C.P. 106(a)(4) is to review the action of an inferior tribunal which has allegedly exceeded its jurisdiction or abused its discretion).

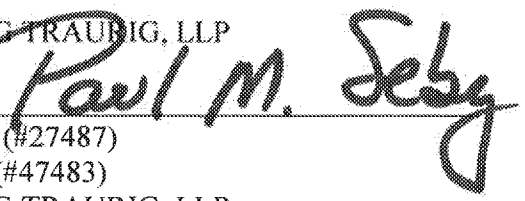
Since the Governor's unlawful Withdrawal Letter was a quasi-judicial action, Defend Colorado's claims under C.R.C.P. 106(a)(4) are appropriate. Further, Defend Colorado's claims under C.R.C.P. 57 and 106(a)(4) are appropriate because they challenge action by both of the Defendants' that occurred outside of the APA context of the Commission's consideration of Defend Colorado's Petition.

VII. CONCLUSION

WHEREFORE, for the reasons set forth above, Defend Colorado respectfully requests that this Court deny the Defendants' Motions to Dismiss in their entirety.

Respectfully submitted this 7th day of June, 2019.

GREENBERG TRAURIG, LLP



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFEND COLORADO'S COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS** upon all parties herein electronically via the Colorado Courts E-File system this 7th Day of June, 2019.

Paul M. Seby (#27487)

E-filed pursuant to C.R.C.P. 121 1-26. A duly signed original is on file at the offices of Greenberg Traurig, LLP